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Multilateral Investment Agreements
and Their Development Dimensions
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Item 3 of the provisional agenda

EXAMINATION AND REVIEW OF EXISTING REGIONAL AND MULTILATERAL INVESTMENT AGREEMENTS AND THEIR DEVELOPMENT DIMENSIONS IN PURSUANCE OF THE MANDATE OF PARAGRAPH 89(b) OF "A PARTNERSHIP FOR GROWTH AND DEVELOPMENT"

Existing regional and multilateral investment agreements and their relevance to a possible multilateral framework on investment: issues and questions

Note by the UNCTAD secretariat

GE.98-50065

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INTRODUCTION

1. The Commission on Investment, Technology and Related Financial Issues, at its second session (29 September - 3 October 1997), decided to convene a meeting to undertake an "examination and review of existing regional and multilateral investment agreements and their development dimensions in pursuance of the mandate of paragraph 89 (b) of 'A Partnership for Growth and Development'", which called upon UNCTAD to identify and analyse implications for development of issues relevant to a possible multilateral framework on investment (MFI).[1]

2. The Expert Meeting on "Existing regional and multilateral investment agreements and their development dimensions" is intended to continue the discussion on existing agreements on investment and their implications for development that was initiated last year. The first expert meeting dealing with investment agreements (28-30 May 1997) focused on bilateral investment treaties. It was noted then that these treaties are relatively homogeneous, resembling one another in many ways: as international treaties, they are legally binding; they are concerned exclusively with foreign investment; they seek to encourage investment flows; and they cover largely the same issues which are relatively few in number and relate mostly to the protection and treatment of foreign investors by their host countries.[2]

3. Regional and multilateral instruments dealing with investment,[3] by contrast, tend to pursue a broader variety of objectives than do bilateral investment treaties; although a number of them are devoted solely to investment issues, they often also deal with other topics (e.g. trade, competition); taken together, they cover a broader mix of investment-related issues than do bilateral treaties; and they have varying degrees of specificity and binding strength. The ways in which they may contribute to the development process are also more complex. In sum, regional and multilateral instruments reflect a more differentiated approach to countries' interests and needs, levels of development and perspectives on future development than do bilateral investment treaties.

4. Given the complexity of investment instruments and issues at the regional and multilateral levels, and as another step towards a discussion on issues relevant to a possible MFI, especially its development dimension, it is suggested that the present meeting of experts give special attention to the main objectives pursued by regional and multilateral investment instruments and the definition of investment. When examining investment instruments, it is in any event advisable to consider these two topics at the outset because they can influence significantly the substantive provisions and effects of the instruments involved. Furthermore, it would be difficult to give adequate attention to all relevant topics during a three-day discussion.

5. Going beyond the consideration of these two topics, experts are invited to draw lessons of relevance for a possible MFI from a development perspective. In this context, they are also invited to continue to develop criteria by which to assess the development-friendliness of international

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[1] "A Partnership for Growth and Development" (TD/378), para. 89 (b).

[2] See UNCTAD, "Bilateral investment treaties and their relevance to a possible multilateral framework on investment: issues and questions" (TD/B/COM.2/EM.1/2). See also UNCTAD, *Bilateral Investment Treaties in the mid-1990s* (forthcoming).

[3] Unless otherwise stated, for the purposes of the present Note the term "regional and multilateral instruments" refers to instruments involving more than two parties. They include legally binding as well as voluntary instruments. For this reason, the term "instrument" or "arrangement" is used throughout the text, instead of the term "agreement", which implies a legally binding instrument.

investment instruments.[4]

6. If governments should consider it advisable, other topics and issues relating to investment instruments could be given similar detailed attention in future expert meetings (see in this context also annex 1).

7. To assist the experts in their deliberations, the secretariat has prepared the present Note on "Existing regional and multilateral investment agreements and their relevance to a possible multilateral framework on investment: issues and questions". The issues and questions raised in this Note are indicative only and are merely meant to stimulate the discussion; experts are invited to raise other questions during the meeting.

8. The present Note is complemented by analytical background papers on "International arrangements for foreign investment: an overview" and "Key definitions in international investment instruments", which examine in greater detail some of the main issues and questions raised in the Note. As international instruments typically reflect and influence trends at the national level, the secretariat is also preparing a background document dealing with trends in national foreign direct investment (FDI) regimes. These background papers will be made available upon request. Additional background materials include the *World Investment Report 1996: Investment, Trade and International Policy Arrangements* (chapters V and VI) (Sales No. E.96.II.A.14), *International Investment Instruments: A Compendium* (Sales No. E.96.II.A.9.10.11) and *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy* (Sales No. E.97.II.D.10). Experts have been invited to prepare papers on the issues and questions raised below, for distribution at the expert meeting.

I. OVERVIEW[5]

9. Efforts to elaborate regional and multilateral arrangements dealing with foreign investment started in the 1940s, begining with the Havana Charter which contained various provisions dealing with the treatment of investment for economic development (see annex 2). Over the years, a variety of instruments have been adopted which reflect the priorities and concerns of their particular time. Two roughly delineated periods may be identified. During the first period, covering the 1950s, 1960s and 1970s, the principal concern for host developing countries was to establish and maintain control over their economies and natural wealth. For foreign investors and their home countries, the main preoccupation was to protect their investments from political risks, especially from nationalization. In this climate, only a few multilateral initiatives dealing with specific aspects of FDI protection (notably with the settlement of investment disputes) were successful. Issues of entry and establishment were generally left to be regulated by national laws; such laws in many cases established restrictions, controls and conditions on entry and establishment of foreign affiliates and on their operations, including on the repatriation of profits and capital. This trend was reflected in some regional instruments of the time (e.g. Decision 24 of the Cartagena Agreement). At the same time, certain groupings of countries also began during this period to introduce common liberalization rules, mainly within the OECD and in the context of regional initiatives to promote free trade and economic integration (such as the European Union). At the multilateral level, efforts were made to formulate standards of behaviour for transnational corporations (TNCs). Although a comprehensive global instrument

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[4] On the basis of the deliberations of the May 1997 expert meeting, the UNCTAD secretariat prepared an informal "Catalogue of criteria for determining the development-friendliness of international investment agreements" (Com.2/Criteria/1(97)), mimeograph.

[5] For an elaboration, see UNCTAD, *World Investment Report 1996: Investment, Trade and International Policy Arrangements* (United Nations publication, Sales No. E.96.II.A.14), chapter V.

did not materialize, a number of mainly non-binding arrangements dealing with specific investment issues were completed during the 1970s, notably on employment and labour relations.

10. This trend was reversed during the 1980s when national laws and policies began to shift in the direction of liberalization and the protection and promotion of FDI. The new trend reflected changes in world economic conditions, such as the debt crisis, as well as changed needs and perceptions as to the role of FDI in growth and development. And, as development strategies pursued by governments began to move more towards outward-looking policies emphasizing export-led growth, they stressed the opportunities offered by FDI to establish linkages with globally integrated production, distribution and marketing networks, and led to a more coherent policy approach to trade and investment.

11. This change in approach to FDI is reflected not only in the growth of bilateral investment treaties, but also in a growing number of regional instruments and in sectoral and issue-specific multilateral agreements, notably on services, performance requirements and political risks-insurance coverage. A pattern appears to be emerging, mainly in recent regional agreements (e.g. NAFTA), to consolidate in one instrument an expanded set of issues of liberalization and protection, while procedures for the gradual elimination of restrictions are strengthened and provision is made for the settlement of investment disputes, including those between investors and host States. A number of instruments, however, do not go that far.

12. Most regional and multilateral investment instruments are legally binding, although there are exceptions (e.g. the OECD Guidelines, the APEC Investment Principles and the World Bank Guidelines on the Treatment of Foreign Direct Investment). Substantive issues addressed in instruments include:

- scope and definitions;
- admission and establishment, including ownership and control;
- operational measures, including performance requirements and entry and stay of key personnel;
- incentives;
- national treatment;
- most-favoured-nation treatment;
- fair and equitable treatment;
- taxation;
- competition;
- transfer pricing;
- transfer of technology (including intellectual property rights);
- employment and social issues;
- environmental issues;
- conflicting requirements;
- home country measures;
- illicit payments;
- taking of property;
- state contracts;
- transfer of funds;
- transparency;
- settlement of disputes.

The extent to which, and the manner in which, these issues are incorporated in specific regional and multilateral instruments vary considerably, as does the strenght with which they are addressed.

II. ISSUES AND QUESTIONS RELATING TO REGIONAL AND MULTILATERAL INVESTMENT INSTRUMENTS

A. Main objectives pursued

13. There is an underlying assumption in concluding regional and multilateral investment instruments - as, indeed, any international instrument

- that the interests of all countries involved should be taken into account. In other words, an instrument should serve the mutual interests of the parties. Such interests need not be the same for all countries; but, in the final analysis, every participating country should be satisfied that, on balance, it is benefiting from the operation of the instrument.

1. The objective of development

14. For developing countries, of course, the overarching objective of instruments in this area is the promotion of economic growth and development. This is, indeed, a fundamental objective of most regional and multilateral investment instruments. Many of them expressly refer to it as one of their fundamental goals and recognize that cooperation among governments and between firms and governments can contribute to it (annex 3). Development objectives are particularly important in instruments between developing and developed countries. Many of these instruments tend to acknowledge that the developmental needs and concerns of developing countries need to be given particular attention.

Issues that deserve attention include:

(a) How do investment instruments articulate development objectives? For example, are development objectives defined as the main objective of the agreement or as an additional objective?

(b) What are the implications of giving effect to the development objective for the structure and contents of investment instruments? What concrete measures can investment instruments contain that are explicitly and specifically meant to enhance the development of developing countries?

(c) How do development objectives influence the pattern of exceptions, derogations, reservations and phasing provisions in investment instruments?

(d) What are the advantages and disadvantages of regional and multilateral investment instruments, in comparison with bilateral investment treaties, for pursuing the development objective?

(e) How can discussions on a possible MFI benefit from the experience in dealing with development objectives in existing investment instruments?

2. Other objectives

15. There are other objectives that investment instruments are meant to serve, often indeed as a means of promoting the ultimate objective of economic growth and development. Many of these objectives are linked to the growth of FDI, its protection and the progressive liberalization of FDI laws; there are also a number of other objectives, some of which are quite specific. They include the following (annex 3):

- to facilitate and promote foreign investment flows;
- to promote the flow of technology and capacity-building;
- to protect foreign investment;
- to provide mechanisms for the settlement of investment disputes;
- to provide stability and predictability in international investment relations;
- to promote a gradual liberalization of restrictive investment policies;
- to facilitate access to markets;
- to increase transparency of existing policies and measures relating to foreign investment;
- to ensure the proper functioning of markets and promote competition with international investment operations;
- to promote international standards for the behaviour of TNCs;
- to encourage the positive contributions that TNCs can make, and

to minimize and resolve the difficulties to which their operations may give rise;
- to promote various specific objectives (e.g. consumer protection, environmental protection);
- to promote the deeper integration of national economies.

Issues that deserve attention are:

(a) What are the interrelationships between the development objective and various other objectives?

(b) If other objectives compete with the development objective, how can they be reconciled?

(c) What lessons can be drawn, of relevance for a possible MFI, from the experience with objectives pursued by international investment instruments?

B. Definition of investment

16. The purpose of definitions in legal instruments is to determine the object to which an instrument's provisions apply and the scope of their applicability. Definitions therefore are not neutral. They form part of the normative content of the instrument and thus pose complex questions of policy. Many investment instruments define the key term "investment", although other instruments dealing with investment do not define the term (see, for example the European Community Treaty, Articles 52 and 73). The definitions of other terms, such as "investor", "control", "foreign investment" and other related concepts are also important, and their relevance varies from instrument to instrument, depending on the nature and geographical coverage of the instrument and the issues and subjects it addresses.

17. The manner in which investment instruments deal with the definition of "investment" depends primarily on the scope and purpose of each instrument (annex 4). This is particularly important when it comes to the protection and liberalization of investment. Instruments oriented towards investment protection tend to have broad and inclusive definitions. Instruments oriented towards liberalization tend to use relatively narrow definitions of investment, in the light of the differences between FDI and other kinds of international transactions. A typically broad (asset-based) definition of investment includes movable and immovable property and property rights, companies (as assets) and interests in companies (e.g. shares), intellectual property rights, non-equity forms of investment and long-term contractual rights, such as those created by administrative concessions. An important question is the extent to which portfolio investment is covered under this type of broad asset-based definition.

Issues that deserve attention include:

(a) What are the implications of broader or narrower definitions of investment in terms of the substantive provisions (e.g. admission, treatment, protection standards, settlement of disputes) in investment instruments?

(b) What are the advantages and disadvantages of broad or narrow definitions of investment from a development perspective? In particular, what are the advantages or disadvantages of definitions that cover portfolio investment, intangibles and non-equity forms of investment?

(c) What are the implications for development of definitions of investment that are linked to approval or other conditions set by the host country? To what extent can a definition of investment introduce the concept of "quality" investment?

(d) What lessons can be learned, relevant for a possible MFI, from the experience with the definition of investment in international investment instruments?

ANNEXES

Annex 1. UNCTAD activities relating to a possible MFI

Under the guidance of UNCTAD's Commission on Investment, Technology and Related Financial Issues, the UNCTAD secretariat is pursuing a number of activities relating to a possible MFI. The prime objective of these efforts is to help developing countries to participate as effectively as possible in international discussions and negotiations on FDI, be it at the bilateral, regional, plurilateral or multilateral level. With a view to consensus-building, the activities concentrate on deepening the understanding of the issues involved, exploring the range of issues that needs to be considered, identifying interests and ensuring that the development dimension is understood and adequately addressed.

On the operational level, the secretariat's efforts include the following major components:

- *Substantive servicing of intergovernmental activities.* The secretariat provides substantive support to various pertinent intergovernmental activities, including meetings of the Commission on Investment, Technology and Related Financial Issues, as well as expert meetings called by it, and monitors other selected intergovernmental activities such as the WTO Working Group on the Relationship between Trade and Investment.

- *MFI Issues Paper Series.* The main purpose of this series of over 20 papers is to address key concepts and issues relevant to international investment instruments, and to present them in a manner that is useful to policy-makers and negotiators. Particular attention is given to the way in which the key issues have been addressed so far in international investment agreements, the economic effects, especially under conditions of liberalization, and the needs and concerns of developing countries.

- *Regional symposia.* These symposia for policy-makers in capitals aim at facilitating a better understanding of key issues related to international investment agreements, particularly from a development perspective. The first regional symposium for Africa took place in Fèz, Morocco, in June 1997, with participants from 21 African countries. Further symposia are scheduled to take place during 1998 in Asia as well as in Latin America and the Caribbean.

- *Geneva-based seminars.* Undertaken jointly with the WTO, these will continue the Divonne-seminar series for UNCTAD and WTO delegates started in 1995 in order to facilitate informal discussions and the exchange of experiences on investment issues and policies among various delegations. The seminars start with an examination of the economics of FDI and its implications for development and then continue with a discussion of key issues. While the principal participants will be delegates, selected experts from academia and representatives from civil society, including the private sector, are invited as well.

- *Public-private sector dialogue on MFI issues.* The secretariat has invited interested groups from civic society, including the private sector, to participate actively in a dialogue with relevant policy-makers on international investment agreements. The first event, which took place on 8 December 1997, was a high-level discussion, co-sponsored by UNCTAD and the European Roundtable of Industrialists, in which more than 20 ambassadors and 15 European business leaders participated.

- *Training activities on FDI for capacity-building purposes.* Further training activities on FDI will consist of training courses for junior diplomats and a masterclass for negotiators. The principal target audience for the first training activity consists of junior diplomats

and government officials from capitals; a pilot event was the UNCTAD/UN Staff College workshop - "International investment and developing countries beyond 2000" - held in Turin, Italy, in December 1997. The principal target audience for the masterclass consists of senior officials, primarily from capitals, dealing with the negotiation of international investment agreements.

Annex 2. Main international instruments[a] dealing with FDI, 1948-1997

Year[b]	Title	Setting	Level	Form	Status
1948	Havana Charter for an International Trade Organization	International Conference on Trade and Employment	Multilateral	Binding	Not ratified
1948	Draft Statutes of the Arbitral Tribunal for Foreign Investment and of the Foreign Investments Court	International Law Association	Non-governmental	Non-binding	Not adopted
1949	International Code of Fair Treatment for Foreign Investments	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1957	Treaty Establishing the European Economic Community	European Economic Community	Regional	Binding	Adopted
1957	Agreement on Arab Economic Unity	Agreement on Arab Economic Unity	Regional	Binding	Adopted
1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards	United Nations	Multilateral	Binding	Adopted
1961	Code of Liberalisation of Capital Movements	OECD	Regional	Binding	Adopted
1961	Code of Liberalisation of Current Invisible Operations	OECD	Regional	Binding	Adopted
1962	United Nations General Assembly Resolution 1803 (XVII): Permanent Sovereignty over Natural Resources	United Nations	Multilateral	Non-binding	Adopted
1963	Model Tax Convention on Income and on Capital	OECD	Regional	Non-binding	Adopted
1965	Common Convention on Investments in the States of the Customs and Economic Union of Central Africa	Customs and Economic Union of Central Africa	Regional	Binding	Adopted
1965	Convention on the Settlement of Investment Disputes between States and Nationals of Other States	World Bank	Multilateral	Binding	Adopted
1967	Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade	OECD	Regional	Non-binding	Adopted
1967	Draft Convention on the Protection of Foreign Property	OECD	Regional	Non-binding	Not open for signature

Year[b]	Title	Setting	Level	Form	Status
1969	Agreement on Andean Subregional Integration	Andean Common Market	Regional	Binding	Adopted
1970	Agreement on Investment and Free Movement of Arab Capital among Arab Countries	Arab Economic Unity	Regional	Binding	Adopted
1970	Decision No. 24 of the Commission of the Cartagena Agreement: Common Regulations Governing Foreign Capital Movement, Trade Marks, Patents, Licences and Royalties	Andean Subregional Integration Group	Regional	Binding	Superseded
1971	Convention Establishing the Inter-Arab Investment Guarantee Corporation	Inter-Arab Investment Guarantee Corporation	Regional	Binding	Adopted
1972	Joint Convention on the Freedom of Movement of Persons and the Right of Establishment in the Central African Customs and Economic Union	Central African Customs and Economic Union	Regional	Binding	Adopted
1972	Guidelines for International Investment	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1973	Agreement on the Harmonisation of Fiscal Incentives to Industry	Caribbean Common Market	Regional	Binding	Adopted
1973	Treaty Establishing the Caribbean Community	Caribbean Community	Regional	Binding	Adopted
1974	United Nations General Assembly Resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order and United Nations General Assembly Resolution 3202 (S-VI): Programme of Action on the Establishment of a New International Economic Order	United Nations	Multilateral	Non-binding	Adopted
1974	United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States	United Nations	Multilateral	Non-binding	Adopted
1975	The Multinational Companies Code in the UDEAC (Customs and Economic Union of Central Africa)	Customs and Economic Union of Central Africa	Regional	Binding	Adopted
1975	Charter of Trade Union Demands for the Legislative Control of Multinational Companies	International Confederation of Free Trade Unions	Non-governmental	Non-binding	Adopted

Year[b]	Title	Setting	Level	Form	Status
1975	International Chamber of Commerce Rules of Conciliation and Arbitration	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1976	Declaration on International Investment and Multinational Enterprises	OECD	Regional	Binding/non-binding[c]	Adopted
1976	Arbitration Rules of the United Nations Commission on International Trade Law	United Nations	Multilateral	(Model)	Adopted
1977	ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy	International Labour Office	Multilateral	Non-binding	Adopted
1977	International Chamber of Commerce Recommendations to Combat Extortion and Bribery in Business Transactions	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1979	Draft International Agreement on Illicit Payments	United Nations	Multilateral	Binding	Not adopted
1979	United Nations Model Double Taxation Convention between Developed and Developing Countries	United Nations	Multilateral	(Model)	Adopted
1980	The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices	United Nations	Mutltilateral	Non-binding	Adopted
1980	Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data	OECD	Regional	Non-binding	Adopted
1980	Unified Agreement for the Investment of Arab Capital in the Arab States	League of Arab States	Regional	Binding	Adopted
1980	Treaty Establishing the Latin American Integration Association (LAIA)	LAIA	Regional	Binding	Adopted
1981	International Code of Marketing of Breast-milk Substitutes	World Health Organization	Multilateral	Non-binding	Adopted
1981	Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data	Council of Europe	Regional	Binding	Adopted
1981	Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference	Islamic Conference	Regional	Binding	Adopted
1981	Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States	Preferential Trade Area for Eastern and Southern African States	Regional	Binding	No longer in effect

Year[b]	Title	Setting	Level	Form	Status
1982	Community Investment Code of the Economic Community of the Great Lakes Countries (CEPGL)	CEPGL	Regional	Binding	Adopted
1983	Draft United Nations Code of Conduct on Transnational Corporations	United Nations	Multilateral	Non-binding	Not adopted
1983	Treaty for the Establishment of the Economic Community of Central African States	Economic Community of Central and African States	Regional	Binding	Adopted
1985	Draft International Code of Conduct on the Transfer of Technology	United Nations	Multilateral	Non-binding	Not adopted
1985	United Nations General Assembly Resolution 39/248: Guidelines for Consumer Protection	United Nations	Multilateral	Non-binding	Adopted
1985	Convention Establishing the Multilateral Investment Guarantee Agency	World Bank	Multilateral	Binding	Adopted
1985	Declaration on Transborder Data Flows	OECD	Regional	Non-binding	Adopted
1987	Agreement for the Establishment of a Regime for CARICOM Enterprises	Caribbean Common Market	Regional	Binding	Adopted
1987	Revised Basic Agreement on ASEAN Industrial Joint Ventures	ASEAN	Regional	Binding	Adopted
1987	An Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments	Agreement among the ASEAN countries	Regional	Binding	Adopted
1989	Fourth ACP-EEC Convention of Lomé	ACP-EU	Regional	Binding	Adopted
1990	Criteria for Sustainable Development Management: Towards Environmentally Sustainable Development	United Nations	Multilateral	Non-binding	Adopted
1990	Charter on a Regime of Multinational Industrial Enterprises (MIEs) in the Preferential Trade Area for Eastern and Southern African States	Preferential Trade Area for Eastern and Southern African States	Regional	Binding	Adopted
1991	Decision 291 of the Commission of the Cartagena Agreement: Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties	Andean Subregional Integration Group	Regional	Binding	Adopted

Year[b]	Title	Setting	Level	Form	Status
1991	Decision 292 of the Commission of the Cartagena Agreement: Uniform Code on Andean Multinational Enterprises	Andean Subregional Integration Group	Regional	Binding	Adopted
1991	The Business Charter for Sustainable Development: Principles for Environmental Management	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1992	Guidelines on the Treatment of Foreign Direct Investment	World Bank	Multilateral	Non-binding	Adopted
1992	Articles of Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit	Islamic Conference	Regional	Binding	Adopted
1992	North American Free Trade Agreement	Canada, Mexico and the United States	Regional	Binding	Adopted
1992	The CERES Principles	CERES	Non-governmental	Non-binding	Adopted
1993	Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of which only One is a State	Permanent Court of Arbitration	Multilateral	Binding	Adopted
1993	Treaty Establishing the Common Market for Eastern and Southern Africa	Common Market for Eastern and Southern Africa	Regional	Binding	Adopted
1994	Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods. Agreement on Trade-Related Investment Measures	World Trade Organization	Multilateral	Binding	Adopted
1994	Marrakesh Agreement Establishing the World Trade Organization. Annex 1B: General Agreement on Trade in Services and Ministerial Decisions Relating to the General Agreement on Trade in Services	World Trade Organization	Multilateral	Binding	Adopted
1994	Marrakesh Agreement Establishing the World Trade Organization. Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights	World Trade Organization	Multilateral	Binding	Adopted
1994	Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in the MERCOSUR (Intra-zonal)	MERCOSUR	Regional	Binding	Adopted
1994	Recommendation of the Council on Bribery in International Business Transactions	OECD	Regional	Non-binding	Adopted

Year[b]	Title	Setting	Level	Form	Status
1994	Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR	MERCOSUR	Regional	Binding	Adopted
1994	Free Trade Agreement of the Group of Three	Colombia Mexico and Venezuela	Regional	Binding	Adopted
1994	APEC Non-Binding Investment Principles	APEC	Regional	Non-binding	Adopted
1994	Energy Charter Treaty	European Energy Charter Conference	Regional	Binding	Provisional application
1995	Consumer Charter for Global Business	Consumers International	Non-governmental	Non-binding	Adopted
1995	Pacific Basin Charter on International Investments	Pacific Basin Economic Council	Non-governmental	Non-binding	Adopted
1996	Protocol to amend the 1987 Agreement among six ASEAN Member Countries for the Promotion and Protection of Investments	Six ASEAN member countries	Regional	Binding	Adopted
1997	Fourth Protocol to the General Agreement on Trade in Services (on Basic Telecommunications Services)	WTO	Multilateral	Binding	Adopted
1997	Convention on Combating Bribery of Foreign Officials in International Business Transactions	OECD	Regional	Binding	Adopted
1997	Fifth Protocol to the General Agreement on Trade in Services (on Financial Services)	WTO	Multilateral	Binding	Adopted

Source: Updated from UNCTAD, *World Investment Report, 1996: Investment, Trade and International Policy Arrangements* (United Nations publication, Sales No. E.96.II.A.14) chapter V. The instruments listed here prior to 1996 are reproduced in whole or in part in UNCTAD, *International Investment Instruments: A Compendium* (United Nations publication, Sales No.E.96.II.A.9.10.11).

[a] Bilateral investment treaties and directives of the European Union are not included in the table.

[b] Dates given relate to original ratification. Subsequent revisions of instruments are not included.

[c] The OECD Declaration on International Investment and Multinational Enterprises is a political undertaking supported by legally binding Decisions of the Council. The Guidelines on Multinational Enterprises are non-binding standards.

Annex 3. Examples of objectives stated in regional and multilateral investment instruments[a/]

A. Regional instruments

The ASEAN Agreement for the Promotion and Protection of Investments (as amended by the 1996 Protocol

...

Further considering that the Heads of Government of ASEAN ...recognized inter alia that the acceleration of the industrialization of the region requires the increase flow of technology and investments, and toward the attainment of this common objective, directed that measures be taken to stimulate the flow of technology, know-how and private investments among the member states ...

Desiring that appropriate measures be taken to carry out the foregoing intents and to create favourable conditions for investments by nationals and companies of any ASEAN member state in the territory of the other ASEAN member states and to facilitate the desired flow of private investments therein to increase prosperity in their respective territories;

* * *

MERCOSUR Protocol of Colonia on Investment (Intrazone)

Considering:

That the creation of favourable conditions for the investments of investors from one of the States Parties of MERCOSUR in the territory of any of the other States Parties will intensify economic co-operation and accelerate the process of integration;

That the promotion and protection of such investments on the basis of the Protocol will contribute to stimulating private economic initiative and to increase the development of the four States parties.

* * *

APEC Non-Binding Investment Principles

Recognizing the importance of investment to economic development, the stimulation of growth, the creation of jobs and the flow of technology in the Asia-Pacific region,

Emphasising the importance of promoting domestic environments that are conducive to attracting foreign investment, such a stable growth with low inflation, adequate infrastructure, adequately developed human resources, and protection of intellectual property rights,

...

Aiming to increase investment, including investment in small and medium enterprises, and to develop supporting industries,

Acknowledging the diversity in the level and pace of development of member economies as may be reflected in their investment regimes, and committed to ongoing efforts towards the improvement and further liberalization of their investment regimes,

...

* * *

Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference

...

Endeavouring to avail of the economic resources and potentialities available therein and to mobilize and utilize them in the best possible manner, within the framework of close cooperation among Member States,

Convinced that relations among the Islamic States in the field of investment are one of the major areas of economic cooperation among these states through which

economic and social development therein can be fostered on the basis of common interest and mutual benefit,

Anxious to provide and develop a favourable climate for investments, in which the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of their peoples,

...

* * *

Unified Agreement for the Investment of Arab Capital in the Arab States

...

Proceeding from the aim of strengthening overall Arab development and Arab economic integration,

Believing that investment dealings between Arab States are an essential part of joint Arab economic action, the regulation of which will mobilize production and thus enhance joint development on the basis of reciprocal benefits and national interests,

Sharing a conviction that providing a suitable investment climate to stimulate Arab economic resources in the field of joint Arab investment requires that legal investment regulations be drawn up in the context of a well-established, coherent and integrated legal system which seeks to facilitate the transfer and use of Arab capital within the Arab States in such a manner as to further their development, freedom and progress and improve the living standard of their citizens,

Recognizing that the potential scope of such system is more conducive to a form of Arab economic citizenship sharing common features whereby the Arab investor, irrespective of nationality, may operate according to provisions identical to those applied by any State to its citizens, together with provisions for freedom to transfer Arab capital within the Arab States and protect it by means of guarantees against non-commercial risks and a special judicial system, in addition to privileges and facilities which the investor may be granted by the host State within the context of its national sovereignty,

...

* * *

The Energy Charter Treaty

...

Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy;

Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the making of investments pursuant to a supplementary treaty;

...

Determined progressively to remove technical, administrative and other barriers to trade in energy materials and products and related equipment, technologies and services;

...

Recognizing the necessity for the most efficient exploration, conversion, storage, transport, distribution and use of energy;

* * *

Declaration on International Investment and Multinational Enterprises

...

Considering

- That co-operation by member countries can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic and social progress and minimise and resolve difficulties which may arise from their various operations;

...

* * *

B. Multilateral instruments

General Agreement on Trade in Services

...

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

...

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs.

* * *

Agreement on Trade-Related Investment Measures

...

Desiring to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition;

Taking into account the particular trade, development and financial needs of developing country Members; particularly those of the least-developed country Members;

Recognizing that certain investment measures can cause trade-restrictive and distorting effects;

* * *

Convention on the Settlement of Investment Disputes Between States and Nationals of other States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

...

* * *

Convention Establishing the Multilateral Investment Guarantee Agency

Considering the need to strengthen international co-operation for economic development to foster the contribution to such development of foreign investment in general and private foreign investment in particular;

Recognizing that the flow of foreign investment to developing countries would be facilitated and further encouraged by alleviating concerns related to non-commercial risks;

Desiring to enhance the flow to developing countries of capital and technology for productive purposes under conditions consistent with their development needs, policies and objectives, on the basis of fair and stable standards for the treatment of foreign investment;

Convinced that the Multilateral Investment Guarantee Agency can play an important role in the encouragement of foreign investment complementing national and regional investment guarantee programs and private insurers of non-commercial risk; ...

* * *

World Bank Guidelines on the Treatment of Foreign Direct Investment

Recognizing

that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade;

that the promotion of private foreign investment is a common purpose of the International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency;

...

that these guidelines, which have benefitted from a process of broad consultation inside and outside these institutions, constitute a further step in the evolutionary process where several international efforts aim to establish a favourable investment environment free from non-commercial risks in all countries, and thereby foster the confidence of international investors; ...

* * *

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

...

The aim of this Tripartite Declaration of Principles is to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise, taking into account the United Nations Resolutions advocating the Establishment of a New International Economic Order.

...

* * *

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

Affirming that a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices can contribute to attaining the objective in the establishment of a new international economic order to eliminate business practices adversely affecting international trade and thereby contribute to development and improvement of international economic relations on a just and equitable basis,

Recognizing also the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries,

Considering the possible adverse impact of restrictive business practices, including among others those resulting from the increased activities of transnational corporations, on the trade and development of developing countries,

Convinced of the need for action to be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries, and the economic development of these countries,

...

Convinced further that the adoption of such a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices will thereby facilitate the adoption and strengthening of laws and policies in the area of restrictive business practices at the national and regional levels and thus lead to improved conditions and attain greater efficiency and participation in international trade and development, particularly that of developing countries, and to protect and promote social welfare in general, and in particular the interests of consumers in both developed and developing countries,

Affirming also the need to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries,

...

* * *

Memorandum Item: Havana Charter for an International Trade Organization

Article 12
International Investment for Economic Development and Reconstruction

1. The Members recognize that:

(a) international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress;

(b) the international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments;

(c) without prejudice to existing international agreements to which Members are parties, a Member has the right:

(i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;

(ii) to determine whether and to what extent and upon what terms it will allow future foreign investment;

(iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments;

(iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments;

(d) the interests of Members whose nationals are in a position to provide capital for international investment and of Members who desire to obtain the use of such capital to promote their economic development or reconstruction may be promoted if such Members enter into bilateral or multilateral agreements relating to the opportunities and security for investment which the Members are prepared to offer and any limitations which they are prepared to accept of the rights referred to in sub-paragraph (c).

* * *

a/ The texts of the Instruments cited above appear in UNCTAD, *International Investment Instruments: A Compendium*, vols. I, II and III. (United Nations publication, Sales No. E.96.II.A.9,10,11).

Annex 4. Examples of definitions of investment[a]/

North American Free Trade Agreement

Investment means:

"(a) an enterprise;
(b) an equity security of an enterprise;
(c) a debt security of an enterprise
  (i) where the enterprise is an affiliate of the investor, or
  (ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise
  (i) where the enterprise is an affiliate of the investor, or
  (ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assests of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

  (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

  (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but does not mean,

(i) claims to money that arise solely from

  (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

  (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d), or

(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h);"

* * *

The ASEAN Agreement for the Promotion and Protection of Investments (as amended)

Article 1

Definition

(3) The term "investment" shall mean every kind of asset and in particular shall include though not exclusively:

(a) movable and immovable property and any other property rights such as mortgages, liens and pledges;

(b) shares, stocks and debentures of companies or interests in the property of such companies;

(c) claims to money or to any performance under contract having a financial value;

(d) intellectual property rights and goodwill;

(e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract, or exploit natural resources.

* * *

Unified Agreement for the Investment of Arab Capital in the Arab States

Article 1

5. Arab capital: assets owned by an Arab citizen comprising any material and immaterial rights which have a cash valuation, including bank deposits and financial investments. Revenues accruing from Arab assets shall be regarded as Arab assets, as shall any joint share to which this definition applies;

6. Investment of Arab capital: the use of Arab capital in a field of economic development with a view to obtaining a return in the territory of a State Party other than the State of which the Arab investor is a national or its transfer to a State Party for such purpose in accordance with the provisions of this Agreement;

* * *

The Energy Charter Treaty

Article 1

Definitions

(6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

* * *

OECD Code of Liberalisation of Capital Movements

Annex A

List A

1. Direct investment

Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence in the management thereof:

A. In the country concerned by non-residents by means of:

1. Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise;

2. Participation in a new or existing enterprise;

3. A loan of five years or longer.

B. Abroad by residents by means of:

1. Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise;

2. Participation in a new or existing enterprise;

3. A loan of five years or longer.

* * *

a/ The texts of the Instruments cited above appear in UNCTAD, *International Investment Instruments: A Compendium*, vols. I, II and III (United Nations publication, Sales No. E.96.II.A.9,10,11).

* * *

Memorandum Item: Examples of definitions of investment in bilateral investment treaties

BIT between Bangladesh and Italy (1990)

Definition of investment

The term "investment" shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other, in conformity with the laws and regulations of the latter.

Without limiting the generality of the foregoing, the term "investment" comprises:

a) movable and immovable property, and any other rights in rem including, insofar as they may be used for investment purposes, real guarantees on others' property;

b) shares, debentures, equity holdings and any other negotiable instrument or document of credit, as well as Government and public securities in general;

c) credits for sums of money or any right for pledges or services having an economic value connected with investments, as well as reinvested income as defined in paragraph 5 thereafter;

d) copyright, commercial trademarks, patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill;

e) any right of a financial nature accruing by law or by contract and any licence, concession or franchise issued in accordance with current provisions governing the exercise of business activities, including prospecting for, cultivating, extracting and exploiting natural resources.

***

BIT between Ecuador and the United Kingdom

Article 1 (a) Definition of investment

For the purposes of this Agreement:

(a) "investment" means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares, stock and debentures of companies or interests in the property of such companies;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights and goodwill;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

* * *